UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
v.	)	***CRIM No. 94-19-P-H***
	)	
JOSEPH J. THIBOUTOT, JR.,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON MOTION TO SUPPRESS

The defendant is charged in a two-count indictment with being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1), and possessing a firearm from which the manufacturer's serial number had been removed or obliterated, in violation of 18 U.S.C. 922(k). He seeks the suppression of all physical evidence seized in a search of his motel room on January 6, 1994 and the fruits of the search, including any statements, admissions and confessions. An evidentiary hearing was held on April 29, 1994. I recommend that the following findings of fact be adopted and that the motion to suppress be denied.

I. Proposed Findings of Fact

On the basis of information obtained from an informant on January 2, 1994 indicating that an individual bearing the defendant's name was involved in drug parties taking place in Room 10 of the Sandman Motel in South Portland, Maine, Officer Travis Noble, supervisor of the South Portland Police Department's narcotics unit, began an investigation into possible narcotics violations. This investigation included a limited surveillance of the motel, confirming with the desk clerk that a Joseph Thiboutot was a registered guest in Room 10 and a state computer check that

revealed the existence of an outstanding bench warrant for the arrest of Joseph J. Thiboutot, Jr. for failure to appear in court on a charge of operating a defective motor vehicle. After confirming that the warrant remained outstanding, Noble and two other South Portland Police officers went to the Sandman Motel on January 6, 1994 with the intention of arresting Joseph J. Thiboutot, Jr. One of the officers was in uniform and the other two wore marked vests indicating their status as police.

The police knocked on the door to Room 10 and the defendant responded by opening the door. He stood six feet six inches tall and appeared to weigh over 200 pounds, matching the description the police had of him. Noble identified himself as a narcotics officer and asked the defendant if he was Joseph J. Thiboutot, Jr. The defendant responded affirmatively. Noble then asked if he and the other officers could enter the defendant's room in order to speak with him. The defendant said they may and stepped back into the room from the doorway as the officers stepped in.[1] Noble observed marijuana roaches in plain view on a nightstand and asked the defendant if he had any other contraband. He said he did and produced a bag of marijuana containing approximately two grams, which he gave to Noble. Noble then asked the defendant for identification and, after confirming that he was the individual named in the arrest warrant, explained that a warrant was outstanding for his arrest and placed him under arrest. The defendant was then handcuffed. In the process, he acknowledged that he was aware of the pendency of the charge against him on which he had failed to appear as well as the outstanding bench warrant.

Noble then asked the defendant if he possessed any other contraband. When he indicated he did not, Noble asked him if he minded if the officers ``look around." Noble explained to the defendant that if he did not consent to a search of his room the police would apply to a judge or magistrate for a search warrant. He also explained that the police were not assured of getting one. The defendant was not told that he could refuse to consent, nor was he asked to sign a written

[1] I do not find credible and do not credit the defendant's contradictory testimony that he stood in the doorway of his room during the entire conversation with Noble concerning the confirmation of his identity and his arrest on the warrant, that he made clear his willingness to go with the police, that he simply asked that he be allowed to get his boots from his room, that he at no time gave permission to the police to enter his room and that they simply followed him into his room.

consent. The defendant, who was at all times polite and cordial to the police, stated that he did not mind if they looked around, asked how long the search would take and indicated that he wanted to be present during the search.

The police officers then searched the room while the defendant watched. At no time did the defendant indicate any objection. The gun referred to in the indictment was found between the box spring and mattress of the defendant's bed. It was positioned about six to twelve inches in from the edge of the bed and about seven to eight feet from where the defendant was arrested and seated during the search. A search of a leather attache case located in the room netted, among other things, a set of scales, a marijuana pipe, six .357 magnum bullets, a test tube with a white powder residue around it, assorted papers, pills, a telephone book and a book asked for and were given permission by the defendant to search the car sitting in front of the motel room, which was registered to the defendant's mother. No written consent was sought.

II. Legal Discussion

The defendant conceded at the conclusion of the hearing that if the court finds, contrary to his account, that he gave the officers permission to enter and then to search his motel room, his motion must necessarily fail. Because I have proposed just such findings of fact, the motion must be denied if those findings are adopted, and I so recommend. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973); *United States v. Barnett*, 989 F.2d 546, 554-56 (1st Cir.), *cert. denied*, 114 S. Ct. 148 (1993). I find that the defendant, in an effort to be cooperative during his arrest, freely gave the police permission to look around his motel room, asking only that he be allowed to watch. At no time did he object to the search or its scope while watching the police conduct it. Moreover, nothing here suggests that the defendant's consent was the product of duress or coercion, express or implied. *Schneckloth*, 412 U.S. at 227. Written consent is not a prerequisite for the establishment of a valid consensual search. *Barnett*, 989 F.2d at 555. Nor is it essential that the searching officers first inform the consenting party of his right to withhold consent, though this is a chief factor the court should consider when assessing the voluntariness of the consent. *Id.* Here, Officer Noble told the defendant that the police would apply for a search warrant if he did not consent. An ordinary person in the defendant's position would have certainly understood this to mean that he could refuse to consent. Presented with this option, the defendant freely chose to let the police search his room.

Even if the defendant's version of the facts respecting the absence of consent to enter and, later, to search his room is adopted, his motion must nevertheless fail because the police were entitled to enter his motel room to effect his arrest and to search it incident to that valid arrest. This is so because the police were executing an outstanding bench warrant for the defendant's arrest for his failure to appear in court.[2] *Payton v. New York*, 445 U.S. 573, 602-03 (1980) (authority to enter residence to execute arrest warrant); *United States v. Cruz Jimenez*, 894 F.2d 1, 6-7 (1st. Cir. 1990)

[2] The arresting officers were not required to have the actual warrant in hand. *See* Fed. R. Crim. P. 4(d)(3).

(motel room search incident to valid arrest). Although the defendant contends that he was arrested while standing in the doorway of his motel room, his own version of the facts makes clear that he then went back into his room, purportedly to get his boots. Under these circumstances the police would have been justified in following him into the room and searching the area within his immediate control, that is, the motel room.[3] *Cruz Jimenez*, 894 F.2d at 7.

The defendant, citing *State v. Ruden*, 774 P.2d 972 (Kan. 1989), argues that the outstanding arrest warrant, being for a traffic infraction, did not justify the officers' entry into his motel room because it was not based on a finding of probable cause that he had committed a crime. His claim is unavailing. First, the underlying charge -- operating a defective motor vehicle -- is a misdemeanor under Maine law. 29 M.R.S.A. 2508(1), 2521. More importantly, the warrant for his arrest issued not because the defendant operated a defective motor vehicle but because he failed to appear in court as he was required to do in order to answer to the charge, a crime in and of itself. *Id.* 2300(3)(A). As a bench warrant, it was presumptively based on the probable cause determination of a neutral magistrate that the defendant had failed to appear in court when required to do so. This is all the Fourth Amendment requires. *See, e.g., United States v. Spencer*, 684 F.2d 220, 223 (2d Cir. 1982), *cert. denied*, 459 U.S. 1109 (1983) (bench warrant for failure to appear); *In re Grand Jury Proceedings Harrisburg Grand Jury 79-1*, 658 F.2d 211, 215 (3rd Cir. 1981) (same); *United States v. Evans*, 574 F.2d 352, 355 (6th Cir. 1978) (same). The defendant acknowledged that he had notice of both the pendency of the underlying charge and the outstanding bench warrant. *Ruden* is inapposite in that it involved bench warrants issued for a failure to appear in civil actions in aid of execution against judgment debtors, a form of civil contempt not a crime. 774 P.2d at 976.

[3] Such a search would have allowed the police to look between the mattress and box spring, an area within the defendant's immediate control, but would not have authorized the police to open and search his black attache case, a closed container not shown to be within the defendant's immediate control. *See Cruz Jimenez*, 894 F.2d at 7 (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)); *see also United States v. Maldonado-Espinosa*, 968 F.2d 101, 104 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993) (search of bag laying on table within arrestee's reach). This is academic, however, because the defendant consented to the search that resulted in the opening of his case.

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to suppress be denied.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 12th day of May, 1994.

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David M. Cohen
United States Magistrate Judge